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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 263

MAAS & WALDSTEIN COMPANY, *Petitioner*,
vs.
THE UNITED STATES OF AMERICA, *Respondent*.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

REPLY BRIEF FOR PETITIONER

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CHAS H. POTTER & CO., INC., WASHINGTON, D. C.

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The respondent's brief refers to a statement made by this Court in *Girard Trust Co. et al. v. United States*, 270 U. S. 163:

> "A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection so that they may take remedial measures at once."

Respondent's brief argues that assessment of the tax as originally returned would not have been illegal and therefore a protest would have been unavailing. We think that

we have answered this argument in our main brief, particularly in Point VI, but we desire to make the following additional observation:

The overassessment in this case was approved by the Commissioner of Internal Revenue on May 9, 1922 (R. 24), and was therefore made under the provisions of Section 1315 of the Revenue Act of 1921 and Section 252 of the same Act.

Section 1315 of the Revenue Act of 1921 reads in part as follows:

> "Sec. 1315. That section 3220 of the Revised Statutes, as amended, is re-enacted without change, as follows:
>
> " 'Sec. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; etc. * * *"

Section 252 of the Revenue Act of 1921 reads in part as follows:

> "Sec. 252. (a) That if, upon examination of any return of income made pursuant to this Act, * * * it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer; etc. * * *"

We take it that the refund in this case was properly made by the Commissioner. At least that point is not in

dispute here. Therefore, the refund must have been made because the prior collection was "in excess of that properly due" (Sec. 252) or "erroneously or illegally assessed or collected" (Sec. 1315) or "unjustly assessed or excessive in amount or in any manner wrongfully collected" (Sec. 1315).

When this Court in the *Girard Trust Company* case stated that the function of the protest was to invite the attention of the taxing authorities to the "illegality" of the collection so that they might take remedial measures at once, we submit that the Court was using the term "illegality" in a generic sense, so to speak, and intended to include all the cases referred to in Sec. 1315 and Sec. 252 of the Revenue Act of 1921, and desired to draw no distinction (if indeed a distinction exists) between taxes which are "erroneous" or "excessive" and those which are "illegal." We submit that the granting of the refund presupposes the illegality of the collection.

On page 9 of its brief, petitioner makes the following statement:

> "In *Greenport Basin & Construction Co.* v. *U. S.*, 260 U. S. 512, a claim for abatement filed before payment of the tax was recognized as a valid protest."

For the sake of clarity, a reference should perhaps here be given to the decision of the District Court in the *Greenport Basin* case (269 Fed. 58), as this Court did not specifically discuss the question of protest in its opinion. The District Court discussed at length the question of whether the filing by the taxpayer of a claim for abatement was a valid protest, and held that it was. This Court in its statement of facts, without discussion, stated simply that the tax was paid under protest.

The *Greenport Basin* case was followed by the District Court of Connecticut in the case of *Capewell Horse Nail Co.* v. *Walsh*, 4 Fed. (2d) 815. In the reargument in

this case, which will be found in 1 Fed. (2d) 818, Thomas, J. said:

> "When the *Greenport Basin* case, 260 U. S. 512, 43 S. Ct. 183, 67 L. Ed. 370, cited in the original memorandum filed by this court was before the Supreme Court of the United States, in his summary of the facts, Mr Justice Brandeis said: 'The company insisted that the correct amount was $12,417.36, and paid the tax as assessed, *under protest.*'
>
> "This is all that was said by the Supreme Court respecting the protest, but in the court below Judge Garvin said, in *Greenport Basin & Constr. Co.* v. *U. S.* (D. C.), 269 F. at page 60: 'Even if it were necessary to plead duress or protest, the petition or complaint sets forth that the defendant computed the tax under compulsion of the regulations and filed a claim for abatement of the taxes assessed before payment. This complies with every requisite of a payment under protest. *Chesebrough* v. *U. S.*, 192 U. S. 253, 24 S. Ct. 262, 48 L. Ed. 432; *City of Philadelphia* v. *Collector*, 5 Wall. 720, 18 L. Ed. 614. The government urges that it is necessary to make a protest at the time of actual payment, but it seems to the court that this would be a useless requirement. The objects of the protest are to define the taxpayer's attitude and to notify the government thereof. These have been fully accomplished by the objection of the taxpayer when the computation was made and by the filing of his claim.'
>
> "From the opinion of the Supreme Court it is apparent that this claim was not stressed, but, on the contrary, abandoned, leaving Judge Garvin's ruling as the law where the taxpayer files a claim for abatement, as he held that such claim for abatement is equivalent to protest. * * *"

This case was appealed and the decision affirmed by the Circuit Court of Appeals, Second Circuit, 4 Fed. (2d) 991 (5 A. F. T. R. 5362), under date of February 2, 1925. The Circuit Court emphatically approved the rule that

once having filed a claim for abatement of the tax, it is not necessary that the taxpayer again protest at the time of payment.

The last point which respondent makes in its brief is that the protest was not sufficiently specific to comply with the requirements of the statute because the protest did not contain full or sufficient evidence in support of the claim. The respondent argues that paragraphs 3 and 4 of Article 52 of Regulations 41 require that the taxpayer shall submit evidence in support of its claim for special assessment and that taxpayer's letter of March 28, 1918, did not contain such evidence.

We believe that the respondent is confusing the requirements laid down by the Regulations as to the *proof* of claim for special assessment with the requirements of Section 1324 (a) as to protest. It is true that the Regulations naturally require a taxpayer to submit proof in support of its claim for special assessment before such claim can be allowed. In fact all claims of taxpayers before the Treasury Department must be supported by proof. The function of a protest, however, is not to *prove* a claim but to give notice of the basis of and reasons for the claim. An examination of the taxpayer's letter of March 28, 1918 (R. 8), will show that the petitioner set forth the basis of and reasons for its protest against taxation under Section 201 and Section 207 with unusual accuracy and clarity.

CONCLUSION

In conclusion, it is again submitted that this case should be remanded to the Court of Claims with instructions to enter judgment therein for the petitioner for interest on the sum of $457,341.37 at the rate of 6% per annum from the date on which the petitioner's 1917 income and excess

profits taxes were paid to the date on which the said taxes were in part refunded to the petitioner.

Respectfully submitted,

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